



MESSAGE
BROADCAST

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)

May 20, 2010

I am David Baker, President of MessageBroadcast.com ("MessageBroadcast"). I hereby submit my company's comments in response to the "Notice of Proposed Rulemaking," CG Docket No. 02-278, released by the Federal Communications Commission ("the Commission") on January 22, 2010, which I am referring to below simply as "NPRM."

Each day, MessageBroadcast delivers on behalf of numerous clients millions of prerecorded messages informing individuals about information pertaining to their accounts with our clients – important information, which is broad encompassing, ranging for example from: (i) fraud alerts; (ii) travel alerts; (iii) alerts relating to changed passwords for accessing "on-line" accounts; to (iv) prescription "ready for pick-up" alerts. These messages do not involve any telemarketing (or "solicitation of goods or services") (referred to below as "solicitational messaging"). The type of message I am talking about, is the "informational" message from an airline, alerting a passenger that the departure time on a scheduled flight has been moved up, to avoid an incoming storm. Then, there is the message from the telecom carrier, to its customer alerting him or her that someone just changed the pass-code to access his or her account electronically via the internet, and to call a toll-free number if he or she is not the person who so authorized the change. Or, the message might be alerting a husband who has ordered the delivery of flowers to his wife on Valentine's day that the delivery was delayed due to inclement weather. Or, the prerecorded call might be a follow-up survey as is mandated by federal law whereby a Medicare provider is asking a patient to take such survey after having made a purchase of health-care equipment covered by Medicare. A significant percentage (20 – 40%) of such informational messaging may be delivered by my company to cellular phones, using phone numbers for future contact that the consumers have provided to our clients – numbers that have been provided for example, during the ordering process, on an application form, via an eMail, or on an internet web site. And, as each day that goes by, with American consumers eliminating their residential (wireline) telephone numbers to rely instead on their wireless cellular phones as their sole means of receiving telephonic communications, that percentage shall increase. In a nutshell, Americans increasingly are selecting their cellular phones

as the **preferred means of communication**, especially when a prospective communication might relate to an urgent or critical matter. The consumer prefers to be alerted sooner, rather than later, and that is why consumers are relying more and more on being notified via cellular phones. Because of this trend, from a policy perspective, any proposed rule that presents obstacles to consumers from receiving important **informational** messaging via prerecordings delivered to their cellular phones needs to be well thought out and practical. For the reasons submitted below, I respectfully submit that the Commission's proposed rulemaking revision that would require a brand new standard as to what constitutes proper "prior express consent" for purposes of delivering prerecorded informational messaging to cellular phones is not well thought out, and would serve as a grave disservice to the American consumer.

Specifically, I am expressing great concern with the Commission's tentative conclusion set forth in Paragraph 20 of the NPRM:

*"that any written consent requirement adopted by the Commission should apply to **both**"* 47 U.S.C. § 227(b)(1)(B) (generally prohibiting prerecorded messages without prior express consent to **residential phone lines**) and 47 U.S.C. § 227(b)(1)(A) (generally prohibiting prerecorded messages without prior express consent to **cellular phones**, as well as to emergency lines and health care facilities). [Emphases added.]

As the Commission explains at footnote 63 of the NPRM, the prohibited calls to **residential (wireline)** numbers are afforded an exemption under the *Telephone Consumer Protection Act* ("TCPA") for **informational** messaging: *"calls that are commercial but do not contain an advertisement (e.g., **informational** calls notifying a customer of a scheduled delivery or notifying airline passengers of flight delays) . . ."* (Emphasis added.) Thus, if the Commission were to "harmonize" its TCPA implementation rules with new rules that the Federal Trade Commission ("FTC") recently imposed as part of its *Telemarketing Sales Rule* ("TSR") implementation rules, by adopting the new standard of what constitutes proper "prior express consent" as now required by the FTC under the TSR, **informational** prerecorded messages delivered to **residential phone lines** would still enjoy an exemption. However, if the Commission were to extend the new prior express consent standard borrowed from the FTC and the TSR, to be applicable to **cellular phones** under the TCPA's 227(b)(1)(A) provision, without any regard to whether the prerecorded message is **informational** in nature, as distinguished from **solicitational**, then the Commission would be imposing a **new** standard that goes **far beyond** any previously stated policy rationale or concern – either as articulated by the Commission itself or the FTC.

The Commission's current standard for purposes of delivering calls to cellular phones as to what constitutes proper prior express consent has been followed for years – it is a less strict standard when compared to the new FTC standard. From the policy perspective of protecting consumers' interests for purposes of receiving **informational** prerecorded messaging, as distinguished from receiving **solicitational** messaging, this less strict standard – one that has been followed by the Commission for nearly two decades – makes solid, good sense. Specifically, the FCC has ruled that *"persons who knowingly release their phone numbers have, in effect, given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."* 7 FCC Record, p. 8752 ¶ 31 (1992). Under this practical, current FCC standard, this means that the consumer who owns a credit card, who provided the issuing financial institution his or her cellular phone number when filling out his or her credit card application, may continue to receive important credit card fraud alerts via prerecorded voice messaging delivered to his/her cellular phone. The current, practical standard used by the

Commission would also mean that if a Commission member has booked a flight on American Airlines out of Ronald Reagan National Airport flying to Dallas, and the Commission member has provided American airlines with his or her cellular number for future contact purposes when first purchasing the ticket, then the Commission member can continue to receive alerts on his or her cellular phone from American Airlines in case there has been a delay in the departure time of the flight. And, for the telecom carrier that must comport to the Commission's 2007 rules enhancing the protection of customer proprietary network information (known as "CPNI"), the Commission's current *TCPA* standard allows the carrier to continue to notify customers immediately via their cellular phones whenever there has been a change to account passwords as is required under Section 222 of the Communications Act of 1934. The Commission's current *TCPA* standard would also mean that the husband who ordered flowers electronically "on line" to be delivered to his wife on Valentine's Day, who inserted his cellular phone number in the appropriate grid when ordering on-line, can be contacted by the floral company to alert him of a delay in delivery due to inclement weather. And, the current standard also means that the elderly man who ordered a "nebulizer" from a Medicare service provider, who provided that service provider with his cellular phone number when ordering the nebulizer, may participate in an Interactive Voice Response survey questionnaire delivered via prerecording to his cellular phone, to check on the level of satisfaction he received from the service provider as mandated by federal law.

What is critical for me to note, however, is that if the Commission were to adopt the FTC standard as to what constitutes proper prior express consent (as used by the FTC relating to the delivery of solicitational messaging), all of these potentially critical **informational** communications that for years have been properly delivered to these consumers' cellular phones would now be prohibited unless the Commission draws a distinction and provides a "carve out" for **informational** messaging, contrasted to **solicitational** messaging.

The Commission's current standard should **not** be replaced by the new standard as now used by the FTC – there is no "need" to replace the Commission's current standard. Cellular phone users are already completely protected from receiving **solicitational** messaging via their cellular phones because the new FTC standard already applies for such solicitational messaging. The cellular phone owner, thereby, is already fully protected. The FTC rule applies strictly to **solicitational** calls. If the Commission were to apply the FTC standard to **informational** prerecorded messaging delivered to cellular phones, then the Commission would be going **far beyond** any currently contemplated standard. Instead of the Commission "harmonizing" and "eliminating confusion," only more confusion would ensue. Why? Because, a completely new standard would apply to an **informational**, prerecorded phone message delivered to a cellular phone. The result would be a huge disservice for consumers en masse needing valuable information. Our nation's consumers would be precluded from hearing voice messaging imparting important information via their cell phones, unless those consumers were to provide a brand new type of "prior express consent." To date, millions of consumers are receiving, and they have every rightful expectation to continue to so receive, important **informational** messaging via their cellular phones **based on an express consent already provided**. The confusion that would arise if these consumers are notified that they can no longer receive important informational messaging after having already provided their consent should not, and cannot, be minimized. And, if companies were forced to stop sending such messages, then potentially millions of consumers would be dissatisfied with the level of service they are receiving from thousands of companies. In today's difficult economic times, our nation's economy and thousands of businesses can ill afford more obstacles in recovering and in operating. Below, in bulleted fashion, I provide an illustrative (but by no means, exhaustive) list of the areas of increased exposure that consumers would experience if time-sensitive information cannot reach their cell phones: exposures in terms of potential damages, dangers or inconveniences that would

result should the Commission finalize its proposed rule that the FTC standard as to what constitutes proper prior express consent would now apply to both provisions at issue (that is, to both 47 U.S.C. § 227(b)(1)(B) (for residential, wireline numbers) and § 227(b)(1)(A) (for cellular, wireless line numbers).

- Credit card fraud;
- Service outages and/or repairs;
- Prescription and over-the-counter drug alerts;
- Security and privacy breaches;
- Account overdrafts;
- Pass-code updates;
- Medical appointment confirmations;
- Schedule, reservation and flight confirmations;
- Consumer satisfaction surveys; and
- Account features and benefits.

For all the reasons set forth above, in the interest of all Americans, I urge the Commission to revise its proposed rule, and ensure that the standard for prior express consent for purposes of delivering prerecorded **informational** messaging to cellular phones does **not** change. In the alternative, and effectuating to the same end, if the Commission does revise its rule to align with the new FTC standard as to what constitutes proper prior express consent, then I urge the Commission to provide an exemption for **informational** calling under 47 U.S.C. § 227(b)(1)(A) (for cellular, wireless line numbers), in a manner similar to the exemption for **informational** calling that the Commission already provides under 47 U.S.C. § 227(b)(1)(B), 2(B) (for residential, wireline numbers) as I explained above when referring to the Commission's footnote 63 of the NPRM.

I thank the Commission members and their staff for their time and consideration.

Sincerely,



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